UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISON

IN RE: LAWNMOWER ENGINE HORSEPOWER MARKETING SALES PRACTICES LITIGATION	)))))))))	**CASE NO.: 2:08MD-01999** **JUDGE Lynn Adelman** **OPPOSITION TO MOTION FOR BOND**

On September 31, 2010, Class Counsel filed a Motion requesting class members Rosalie Borgardts, Paul Palmer, Irving S. Bergrin, Cory A. Buye, and Thomas Basie to post an appeal bond in the amount of $80,000. Class Counsel claimed that the requested amount is justified because of potential delays attributable to the Appeal in the distribution of cash warranty and injunctive relief, additional settlement administration costs, and taxable costs. Of these, only taxable costs (which should be limited to the estimated cost of printing) are appropriate components of an Appeal Bond. Courts in the Second, Fifth, Sixth, Ninth and Eleventh Circuits have held that items such as delay in distribution of cash, additional administration costs and attorneys fees cannot properly be included in the calculation of an Appeal Bond under FRAP 7.

Class counsel basically argues that the Bond is appropriate because 1) the appeal is frivolous; and 2) Objector-Appellant's counsel have objected to Settlements and attorneys' fees in the past. The latter is totally irrelevant to the case at bar. These particular Class Members cannot be penalized and forced to pay a significant bond because of the presence of their counsel in other, unrelated cases. See the Seventh Circuit's Opinion in *Vollmer v. Selden* 350 F. 3d 656 (7^{th} Cir. 2003). What occurred in other cases has no bearing on the facts and issues in the case at bar. Further, the gratuitous *ad hominem* attacks found in Plaintiff's Memorandum are uncalled for and will not be dignified with point-by-point responses thereto.

A. Neither the Objections to Attorney Fees Nor the Appeals Are Frivolous

The overarching theme of Plaintiffs' request for a bond in this case is that Objectors/Appellants' objection to the settlement and class counsel's fees are frivolous, and that Objectors/Appellants counsel are "professional objectors who pursue objections for improper purposes.

First, an appeal is frivolous if "the result is obvious or if the claims of error are wholly without merit." *DeWitt v. Western Pacific Railroad Co.,* 719 F.2d 1448, 1451 (9th Cir. 1983). The fact that there is a body of federal jurisprudence regarding attorney's fees shows reasonable people often differ on this issue. 28 U.S.C. § 1927, which might support a bond for "vexatious litigation conduct," is inapplicable to this appeal as it requires "bad faith or intentional misconduct by counsel." Although the imposition of attorney's fees on appeal as a sanction is allowed under Rule 38, it is only available after the appeals court finds the appeal frivolous, and only upon further motion and hearing. 10 Wright, Miller & Kane, Federal Practice & Procedure, §2675; 2675.2 (2001); see also *Azizian v. Federated Department Stores, Inc.,* 499 F.3d 950, 960 (9th Cir. 2007).

It is well established that whether an appeal is frivolous is solely within the purview of the appellate court, not the district court. *Vaughn v. American Honda Motor Co., Inc.,* 507 F.3d 295, 299 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.,* 496 U.S. 384, 407 (1990); *In re American President Lines, Inc.,* 779 F.2d 714, 717 (D.C. Cir 1985); *Azizian*. Only the appellate court has the authority to impose sanctions for a frivolous appeal, See *Azizian, In re Vasseli,* 5 F.3d 351, 353 (9th Cir 1993) citing *In re American President Lines, Inc.* 779 F.2d 714, 717 (D.C. Cir. 1985). Therefore, this aspect of Plaintiff's argument must fall.

A major portion of the Objector-Appellant's argument below was that the court should wait until the claims period had ended in this claims-made settlement before awarding counsel fees so that the fees could be rationally related to the actual benefit received by the class and not the theoretical numbers used in the settlement agreement. Federal courts have generally followed the Federal Judicial Center guidelines and endeavored to accurately value claims-made settlements when awarding attorney's fees. They do not simply use the amount made available to the class when calculating a percentage attorney's fee, but they wait for the claims to come in and calculate the fee based upon the amount actually paid out to the class members. *See e.g., In re Compact Disc Minimum Advertised Price Litig.*, 370 F. Supp. 2d 320 (D. Me. 2005) (awarding attorney's fees of 30% of value of redeemed coupons, which was 30% of claimed lodestar).

> Recognizing that percentage of funds is the preferred method of assessing fees in a settlement like this, with lodestar analysis providing only a check, I can effectively gauge appropriate attorney fees only if I know the total value of the settlement. But although I am satisfied that the coupon settlement has value to the class, I am not confident of the redemption rate that has been projected and thus of the settlement's total value. Therefore, I have determined to delay award of attorney fees until experience shows how many vouchers are exercised and thus how valuable the settlement really is.

In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 189-90 (D. Me. 2003) (Hornby, D.J.).

B. Class Counsel Has Failed to Follow Proper Procedure For Disposing of an Appeal Alleged to be Frivolous.

In *Azizian*, the Ninth Circuit concluded that "the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38." *Id.* The foregoing is of particular relevance here, where the appellees have not filed a motion to dismiss Appellants' appeal in the Court of Appeals, which they could easily do. If Class Counsel is correct that Appellants' appeal presents no meritorious issues worthy of review based upon full briefing and record, the Court of Appeals will promptly dismiss the appeal, rendering the bond motion moot. If the Court of Appeals denies the motion to dismiss, then it is difficult to see how the Court of Appeals could later find the appeal to be frivolous. Frivolousness is something that should be readily apparent on the face of an appeal at the motion to dismiss stage.

The fact that class counsel has not filed a motion to dismiss in the Court of Appeals is a strong indication that they do not really believe that this appeal is frivolous and have filed this motion only for the purpose of harassing Objector-Appellants and trying to chill their rights.

As the Ninth Circuit has held, the preferable remedy for an appeal alleged to be frivolous is an appropriate motion filed in the Court of Appeals, not a motion for a bond in the district court that issued the order that is being challenged on appeal. Class Counsel's failure to exhaust their remedies in the Court of Appeals is a further reason to deny their request for an appeal bond to secure any fees that may be awarded pursuant to FRAP 38.

C. Administrative and Delay Costs

Plaintiffs argue that $55,000 of the requested bond amount is appropriate because that is their estimate of additional administrative costs that will be incurred. However, *Azizian* flatly prohibits any appeal bond that is not limited to the costs delineated in FRAP 39. In *Azizian* the Ninth Circuit held that "the term 'costs on appeal' in Rule 7 includes all expenses defined as 'costs' by an applicable fee-shifting statute, including attorney's fees." *Id*. at 958. In that case, because the Clayton Act is an "asymmetrical" statute that shifts costs only to defendants, and not to plaintiffs, the Ninth Circuit held that the permissible appeal bond in that case is limited to costs specifically listed in FRAP 39.

Plaintiff also argues that the Bond is needed to protect the Class from delays in distribution of benefits. When faced with a similar question, the Fifth Circuit reached the conclusion that the terms of the settlement agreement control on the issue of delay costs. If the settlement agreement shifts the costs of delay during appeal to the plaintiffs, then there is no basis for any cost bond. *See Vaughn v. American Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007). There, the district court imposed a $150,000 cost bond on the appellant to insure the class against delay value. The Fifth Circuit reversed that bond order, finding that "to the extent the district court had in mind securing the benefits that would inure to the class members under the settlement agreement, the court was essentially using a bond for costs on appeal as a surrogate for a supersedeas bond. Bonds to supersede a judgment must be set under Rule 8, not Rule7." *Id*. at 298-99.

The Fifth Circuit went on to note that the question of who should bear costs of delay on appeal is determined by the settlement agreement, which in *Vaughn*, as here, "makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded. The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs." *Id*. at 299.

The same analysis applies here. Because the Settlement Agreement does not provide that settlement benefits are payable upon this Court's entry of a final approval order, the Agreement placed the risk of an appeal and the attendant delay upon the plaintiffs. An appeal is part of the final approval process, and therefore class members are entitled to no benefits until the appeals are concluded, as provided in the Settlement Agreement.

CONCLUSION

As set forth above, there is no legal or factual support for the imposition of a Rule 7 bond that exceeds the actual costs and it is respectfully requested that this Court issue an Order denying Class Plaintiffs' Motion for Bond for Appeal, or in the alternative, limiting any bond that this Court will consider to only the reasonable actual/projected costs permitted which cannot reasonably be expected to exceed Two Thousand Dollars ($2, 000) in printing and binding costs. The majority of the printing costs will be borne by Objector-Appellants who are responsible for, *inter alia*, the Appendix.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically filed on this 14th Day of September, 2010. Notice of this filing was sent to the parties involved herein via the Court's electronics filing system.

/s/ Edward F. Siegel
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